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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JAN 12 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TRACY H.,)	2 CA-JV 2010-0119
)	DEPARTMENT B
)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
JOHN L. and AISHA L.,)	Appellate Procedure
)	
)	
)	
)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100SV201000020

Honorable Joseph R. Georgini, Judge

VACATED AND REMANDED

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E C K E R S T R O M, Judge.

¶1 Tracy H. appeals the juvenile court’s September 2010 minute entry order dismissing her petition to terminate John L.’s parental rights to his eight-year-old daughter, Aisha. After a contested hearing, the court found John had abandoned Aisha, a statutory ground for terminating a parent’s rights. *See* A.R.S. § 8-533(B)(1). But the court further found Tracy had failed to establish that termination of John’s parental rights would be in Aisha’s best interests, and it denied her petition on that basis. On appeal, Tracy challenges the court’s “best interests” finding. For the following reasons, we vacate the court’s order and remand the case for clarification or reconsideration of that finding.

¶2 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and “shall also consider the best interests of the child.” *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that termination will be in the child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the court’s decision and will accept the court’s findings, if based on reasonable evidence, because “[t]he juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶¶ 4, 13, 53 P.3d 203, 205, 207 (App. 2002). We review de novo issues of law, including “a juvenile court’s interpretation of a

statute.” *Kimu P. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 39, ¶ 13, 178 P.3d 511, 515 (App. 2008).

¶3 Evidence at the termination hearing established that in 2004, John had filed a petition for visitation with Aisha. He and Tracy then litigated custody, visitation, and child support issues until January 2006, when they apparently agreed to a parental access plan, although the plan was never approved by the domestic relations court. It is undisputed that John had little contact with Aisha during the four years that followed. Although Tracy testified that John had not requested visitation from 2006 until 2010 and “just fell off the earth after that mediation agreement,” John maintained that Tracy had obstructed his attempts to see Aisha. He said he had only recently sought to enforce his visitation rights, in April 2010, because he did not want to return to court until he had cured his child-support arrearages, which he had by then accomplished.¹

¶4 John opined that it was in Aisha’s best interest to have a relationship with him and his family, including his parents and his other children. Tracy, in contrast, expressed her view that Aisha’s best interest would be served by termination of John’s rights, which would free her for adoption by Tracy’s husband of two months, Randy H. According to Randy, he and Tracy had been together for almost five years, and Aisha regarded him as a father to her. Randy confirmed his intention to adopt Aisha “as soon as [he was] able to” if John’s parental rights were severed.

¹At the termination hearing, Tracy acknowledged that John was current in his child support payments and had cured approximately \$10,000 in arrearages assessed when child support was first established.

¶5 At the end of the hearing, the juvenile court characterized Aisha as “an innocent girl who probably wishes she had a chance to meet her father and have a relationship” with him. Finding that Randy’s role as “the father figure” in Aisha’s life “isn’t going to change,” and noting the extent of Aisha’s paternal family, including her grandparents and four half siblings, the court stated, “I think I owe it to this little girl to make [John] jump through some hoops to see if it’s possible . . . for her to have a relationship with him.” The court further noted that Tracy and Randy had been married only two months and commented that Aisha was “not ready to be adopted at this time.” The court stated it “ha[d] to consider that, as well[,] as the State does not want children to be parentless and not be legally free to be adopted.”

¶6 On appeal, Tracy argues the juvenile court erred in declining to find termination of John’s parental rights was in Aisha’s best interests, citing the facts establishing John’s abandonment of Aisha during the past four years and Randy’s plan to adopt the child. But the court properly considered Aisha’s best interests as a separate issue; “a finding of the statutory grounds of abandonment standing alone does not permit termination of parental rights.” *In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990). “[A] determination of the child’s best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship.” *Id.* at 5, 804 P.2d at 734 (emphasis omitted). Moreover, although a petitioner “may satisfy the best interest[s] requirement if [she] presents credible evidence that the child is adoptable[,] . . . a determination that the child is adoptable . . . does not require the fact finder to conclude that severance is in the

child's best interests.” *Lawrence R. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 585, ¶ 8, 177 P.3d 327, 329 (App. 2008). Nor are we persuaded by Tracy’s argument that John “marshaled no evidence whatsoever why severance would not be in the best interest of the child,” which misallocates the burden of proof. *See* Ariz. R. P. Juv. Ct. 66(C) (petitioner has burden of proving “that the termination would serve the child’s best interests”); *Kent K.*, 210 Ariz. 279, ¶ 22, 110 P.3d at 1018 (“Arizona’s statutes require that the party seeking termination of parental rights . . . establish the best interests of the child by a preponderance of the evidence.”).

¶7 Tracy also argues, however, that the juvenile court erred as a matter of law when it found there would be “an extended period of time where the child would be fatherless and would not be legally free to be adopted” by Randy. We, too, are confused by this finding.

¶8 Pursuant to A.R.S. § 8-103, “[a]ny adult resident of this state, whether married, unmarried or legally separated is eligible to qualify to adopt children.” Although A.R.S. § 8-112(D)(1) provides for an abbreviated social study if a prospective adoptive parent “is the child’s stepparent who has been legally married to the child’s birth or legal parent for at least one year and the child has resided with the stepparent and parent for at least one year,” we are aware of no barrier to adoption by a stepparent based on the length of his marriage to the birth mother. *See also* A.R.S. § 8-105(N)(1) (exemption from preadoption certification requirement if “[t]he prospective adoptive parent is the spouse of the birth or legal parent of the child to be adopted” not conditioned on length of marriage).

¶9 On this record, we cannot determine whether or to what extent the juvenile court was influenced by a mistaken legal conclusion that Randy would not be legally eligible to adopt Aisha if John’s parental rights were terminated.² Accordingly, we must vacate the court’s minute entry order dismissing Tracy’s petition for termination and remand for clarification or reconsideration of its finding as to Aisha’s best interests. In doing so, we express no opinion as to the merits of the respective positions of the parties on this issue.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

²During the hearing, John had objected to testimony about Randy’s intent to adopt Aisha because no petition for adoption had been filed even though, according to John, it could have been filed contemporaneously with the petition for termination. Thus, the juvenile court might have been referring to a delay in Aisha’s adoption occasioned by the need to initiate a new proceeding. On the other hand, the court admonished John that “the matter can be brought forth again when . . . [Randy] . . . is able to have been married long enough to adopt this child because he is not able to adopt the child right now,” suggesting the court erred in its statement of applicable law, as Tracy argues. Although we presume the court knows and correctly applies the law, *see State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997), the lack of clarity in this record is sufficient to overcome that presumption.